NAJ Global Network Sdn Bhd v Universiti Malaya & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D22–1498 OF 2008
AMELIA TEE ABDULLAH JC
21 DECEMBER 2010

Civil Procedure — Judge — Application to recuse judge — Whether there was real danger of bias — Whether recusal application should be readily granted

Contract — Sale of goods — Claim for payment for goods sold and delivered — Whether first defendant liable for goods ordered by second defendant — Whether second defendant had real or ostensible authority to place orders or receive deliveries on behalf of first defendant — Whether plaintiff had proven its claim against first defendant

Tort — Negligence — Duty of care — Whether first defendant owed duty of care to plaintiff — Whether there was proximity of relationship between first defendant and plaintiff — Whether plaintiff should have taken steps to reduce its own risk

The plaintiff, which was in the business of trading and consultancy, commenced the present action for damages against the first defendant, in respect of 25 golf sets and 20 LCD TV sets ('the goods') sold and delivered to the first defendant, at the request of Norasrin bin Hussain ('the second defendant'), for which it had not received payment. By way of this action the plaintiff sought damages of RM500,000, general damages and aggravated damages. It was the plaintiff's pleaded case that the second defendant had represented that he had the authority to order the goods on behalf of the first defendant and that it was based on that representation that the plaintiff had delivered the goods to the first defendant's premises. The first defendant denied the plaintiff's claim on the grounds that it had neither ordered nor received the goods and that the second defendant who had allegedly ordered the goods had been suspended from work at the material time. The plaintiff's managing director ('the MD') gave evidence that he had no knowledge of the second defendant being suspended from work because he was wearing a name tag of the first defendant at the time when the deliveries were made. The MD also adduced evidence of the photocopy of a cheque allegedly issued by the first defendant for payment of RM250,000 to the plaintiff as part payment for the goods ordered. However, the first defendant contended that the second defendant had no real or ostensible authority to place orders or receive deliveries. As for the cheque for RM250,000, the first defendant replied that a

cheque bearing that cheque number was issued to the second defendant for a sum of RM184.69 for the purpose of paying his salary and not issued to the plaintiff. In the light of this the first defendant concluded that the second defendant would have made a copy of the original cheque and amended the name of the payee, the date and the amount. The first defendant also made reference to its guidelines which set out that all procurements below RM200,000, made before 25 June 2009, were to be by quotation whereas procurements valued at more than RM200,000 were to be by tender. On the morning of the hearing, the plaintiff filed an application for the judicial commissioner ('JC') to recuse himself from hearing this case, on two grounds, namely, that there was an element of bias as the JC having graduated with a degree from the first defendant had a direct link with the first defendant; and on the grounds that the remarks made by the JC during case management were biased.

Held, dismissing the plaintiff's application against the first defendant with costs:

(1) The fact that the JC had graduated from the first defendant university could not give rise to an apprehended or apparent bias and thus could not constitute a valid basis for a recusal application. Similarly, the second ground for the application was also without basis, as comments made in the course of case management and directions to parties to review their own cases could not give rise to an apprehension of bias. In this case, the plaintiff had not succeeded in showing that there was a real danger of bias such that there should be a recusal (see paras 7–8 & 11).

(2) From the sequence of events that led up to the delivery of the goods to the first defendant's premises, it was crystal clear that the plaintiff's dealings had all along been with the second defendant. The court was unable to see the first defendant's role in ordering, purchasing or taking delivery of the goods. Although the plaintiff alleged that the second defendant had represented that he had the authority to order the goods, there was no evidence tendered by the plaintiff that could point to the fact that the second defendant had at any time represented that he had the authority to place the orders on behalf of the first defendant. In fact, at the time when the plaintiff agreed to supply the 25 golf sets he had yet to even see the second defendant's name tag. Similarly the issue about being shown the alleged payment cheque of RM250,000 as part payment for the goods could not be seen as a misrepresentation which induced the plaintiff to supply the goods, as this cheque was only seen after all the goods had been supplied. Thus it was found that from the evidence adduced that it was amply clear that the second defendant had no real or ostensible authority to act for the first defendant in placing orders for the goods and accepting delivery of the same. Further, on the facts it was found that the first defendant had not held out the second defendant as

having any real or ostensible authority. As such, the first defendant was not vicariously liable to the plaintiff for the misrepresentations of the second defendant (see paras 81–83, 85 & 87).

(3) The court accepted the first defendant's reply that a cheque bearing the same cheque number as the photocopy of the cheque shown to the plaintiff was issued to the second defendant for a sum of RM184.69, for the purpose of paying his salary and not issued to the plaintiff. This led to the irresistible conclusion that the second defendant had falsified the cheque (see paras 92–93).

(4) In the instant case there was no proximity of relationship between the plaintiff and the first defendant. In all the circumstances of this case, it was not fair, just and reasonable to impose a duty of care on the first defendant. The court found a multitude of factors which should immediately have put the plaintiff on guard and in any case the plaintiff as a trading company ought to have taken proper steps to reduce their risks. In the police report made by the plaintiff about the falsified cheque the plaintiff had revealed that it was aware that normal procedures were not being followed and that this was the reason why it could not directly deal with the Bursar's office of the first defendant. Thus, the court found that the plaintiff should have exercised due care and attention especially when it entered into dealings which did not follow normal and accepted procedures and that based on these facts the first defendant did not owe a duty of care to the plaintiff (see paras 101–104).

[Bahasa Malaysia summary

Plaintif terlibat dalam perniagaan jual beli dan pakar runding, memulakan tindakan ini untuk ganti rugi terhadap defendan pertama, bagi 25 set golf dan 20 televisyen LCD ('barangan tersebut') yang telah dijual dan dihantar kepada defendan pertama atas permintaan Norasrin bin Hussain ('defendan kedua'), yang mana plaintif tidak menerima bayarannya. Melalui tindakan ini, plaintif memohon ganti rugi sebanyak RM500,000, ganti rugi am dan ganti rugi teruk. Adalah merupakan kes plaintif bahawa defendan kedua telah memberi gambaran bahawa dia mempunyai kuasa untuk memesan barangan tersebut bagi pihak defendan pertama dan bahawa berdasarkan gambaran tersebut plaintif telah menghantar barangan itu ke premis defendan pertama. Defendan pertama menafikan tuntutan plaintif atas dasar bahawa ia tidak pernah memesan atau menerima barangan tersebut dan bahawa defendan kedua yang dikatakan telah memesan barangan tersebut telah digantung kerja pada masa yang material itu. Pengarah urusan plaintif memberi keterangan bahawa dia tidak tahu tentang defendan kedua digantung kerja kerana dia memakai tanda nama defendan pertama pada masa penghantaran dibuat. Pengarah urusan juga memberi keterangan bahawa salinan fotostat cek yang dikatakan dikeluarkan oleh defendan pertama untuk bayaran RM250,000 kepada plaintif sebagai sebahagian pembayaran bagi barangan tersebut yang telah

dipesan. Tetapi, defendan pertama berhujah bahawa defendan kedua tiada kuasa sebenar atau anggapan untuk membuat pesanan atau menerima penghantaran. Bagi cek RM250,000, defendan pertama membalas bahawa cek dengan nombor tersebut dikeluarkan kepada defendan kedua untuk jumlah RM184.69 bagi bayaran gajinya dan bukannya dikeluarkan kepada plaintif. Berikutan perkara ini, defendan pertama membuat kesimpulan bahawa defendan kedua tentunya telah membuat salinan ke atas cek asli dan menukar nama penerima, tarikh dan jumlah. Defendan pertama juga membuat rujukan kepada garis panduannya yang mana menyatakan bahawa semua pemerolehan di bawah RM200,000, dibuat sebelum 25 Jun 2009, perlulah dibuat melalui sebut harga manakala pemerolehan yang dinilai lebih daripada RM200,000 perlu dibuat melalui tender. Pada pagi hari pendengaran, plaintif memfailkan permohonan bagi pesuruhjaya kehakiman ('PK') menarik diri daripada mendengar kes ini, atas dua alasan, iaitu bahawa wujudnya unsur berat sebelah kerana PK tersebut tamat pengajian ijazah daripada defendan pertama, mempunyai hubungan dengan defendan pertama; dan atas alasan bahawa komen-komen yang dibuat oleh PK semasa pengurusan kes adalah berat sebelah.

Diputuskan, menolak permohonan plaintif terhadap defendan pertama dengan kos:

(1) Fakta bahawa PK telah menamatkan pengajiannya daripada universiti defendan pertama tidak membangkitkan kebimbangan atau berat sebelah yang ketara, maka tidak menjadikan asas yang sah bagi permohonan penarikan diri. Sama juga, alasan kedua untuk permohonan tersebut tiada asas kerana komen-komen yang dibuat semasa pengurusan kes dan arahan-arahan kepada pihak-pihak untuk mengkaji semula kes-kes mereka tidak membangkitkan tanggapan berat sebelah. Dalam kes ini, plaintif tidak berjaya menunjukkan bahawa bahaya sebenar berat sebelah yang memerlukan penarikan diri (lihat perenggan 7–8 & 11).

(2) Daripada rentetan kejadian yang menjurus kepada penghantaran barangan tersebut ke premis defendan pertama, adalah jelas bahawa urusan-urusan plaintif selama ini adalah dengan defendan kedua. Mahkamah tidak dapat melihat peranan defendan pertama dalam memesan, membeli atau menerima penghantaran barangan. Walaupun plaintif mendakwa bahawa defendan kedua telah menggambarkan bahawa dia berkuasa untuk memesan barangan tersebut, tiada keterangan dikemukakan plaintif yang boleh menunjukkan bahawa defendan kedua, pada bila-bila masa telah menggambarkan bahawa dia berkuasa untuk memesan bagi pihak defendan pertama. Malah, pada masa apabila plaintif bersetuju membekalkan 25 set golf itu, dia belum lagi melihat tanda nama defendan kedua. Begitu juga dengan isu ia ditunjukkan cek pembayaran RM250,000 sebagai sebahagian bayaran

bagi barangan tersebut tidak boleh dilihat sebagai salah nyataan yang mendorong plaintif membekalkan barangan tersebut, kerana cek tersebut hanya dilihat setelah barangan tersebut dibekalkan. Oleh itu, didapati bahawa daripada keterangan yang dikemukakan, sangat jelas bahawa defendan kedua tiada kuasa sebenar atau anggapan untuk bertindak bagi pihak defendan pertama dalam memesan barangan dan menerima penghantaran. Selanjutnya, daripada fakta-fakta didapati bahawa defendan pertama tidak mempengaruhi defendan kedua mempercayai bahawa dia mempunyai kuasa sebenar atau anggapan. Maka, defendan pertama tidak bertanggungan secara vikarius terhadap plaintif bagi salah nyataan defendan kedua (lihat perenggan 81–83, 85 & 87).

(3) Mahkamah menerima jawapan defendan pertama bahawa cek yang mempunyai nombor yang sama dengan salinan cek yang ditunjukkan kepada plaintif dikeluarkan oleh defendan kedua untuk jumlah RM184.69, untuk membayar gajinya dan bukannya dikeluarkan kepada plaintif. Ini merupakan petunjuk yang memberi kesimpulan bahawa defendan kedua telah memalsukan cek tersebut (lihat perenggan 92–93).

(4) Dalam kes ini, tiada hubungan yang rapat antara plaintif dan defendan pertama. Dalam kesemua keadaan kes ini, adalah tidak adil, saksama dan wajar untuk mengenakan kewajipan berjaga-jaga ke atas defendan pertama. Mahkamah mendapati banyak faktor yang seharusnya membuatkan plaintif berjaga-jaga dan dalam apa jua keadaanpun, plaintif sebagai syarikat dagangan harus mengambil langkah-langkah yang sepatutnya untuk mengurangkan risiko. Dalam laporan polis yang dibuat plaintif tentang cek palsu, plaintif mendedahkan bahawa ia sedar bahawa prosedur biasa tidak dipatuhi dan bahawa inilah sebabnya mengapa ia tidak boleh terus berurusan dengan pejabat Bursar defendan pertama. Maka, mahkamah mendapati bahawa plaintif harus berjaga-jaga dengan sewajarnya terutamanya apabila ia terlibat dengan urus niaga yang tidak mematuhi prosedur biasa dan yang telah diterima pakai dan bahawa berdasarkan fakta-fakta ini, defendan pertama tidak mempunyai kewajipan berjaga-jaga terhadap plaintif (lihat perenggan 101–104).]

Notes

For cases on application to recuse judge, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4139–4148.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on sale of goods in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5121–5123.

Cases referred to

Bainton v Rajski (1992) 29 NSWLR 539 (refd)
Low Kean Giap & Ors v Shaik Alawdeen Shgaik Dawood & Anor [1999] MLJU 377; [1999] 7 CLJ 44, HC (refd)
M'Alister (or Donoghue) (Pauper) v Stevenson [1932] AC 562, HL (refd)
Marchand (litigation guardian of) v Public General Hospital Society of Chatham (2000) 138 OAC 201, CA (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2001] 4 CLJ 701, FC (refd)
Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur [1969] 1 MLJ 123, HC (folld)
Regina v Gough [1993] AC 646, HL (refd)
Tang Liang Hong v Lee Kuan Yew & Anor and other appeals [1998] 1 SLR 97, CA (refd)
Yogananthy AS Thambaiya, Re; Ex P Idris Osman [2007] 3 CLJ 335, HC (refd)

Legislation referred to

Evidence Act 1950 s 90A
Penal Code s 420

Mohamad Fadly bin Zakaria (Zuraidah Naziha & Fadly) for the plaintiff.
Karen Lee (Raja Syarafina bt Raja Shuib with her) (Wong Kian Kheong) for the first defendant.

Amelia Tee Abdullah JC:

[1] The plaintiff, NAJ Global Network Sdn Bhd, claims against Universiti Malaya ('the first defendant') and Norasrin bin Hussain ('the second defendant') for damages of RM500,000 for services and goods sold and delivered to the defendants and for general and aggravated damages. The first defendant has denied the plaintiff's claim on the ground that it had neither ordered nor received the goods and that the person who ordered the goods had no real or ostensible authority to do so. The court records reveal that judgment in default of appearance had been entered against the second defendant on 22 September 2010.

APPLICATION FOR RECUSAL

[2] On the morning of the hearing, the plaintiff filed an application for the judicial commissioner ('JC') to recuse herself from proceeding to hear this case. There were two main grounds for the application, namely:

(a) that there were elements of bias as the JC had a direct link with the first defendant, having graduated with a degree from the first defendant; and

(b) that the JC had made several remarks during case management which were regarded as biased.

[3] The court has perused the application and the affidavit in support of Nik Mohd Ariffin bin Jaafar. The court finds that the fact that the JC had graduated with a Bachelor of Laws (Honours) from Universiti Malaya is not a secret. The information is readily available in the *Malayan Law Journal* from as early as 1976 and the profile on the JC which was annexed as exh NAJ1 in the affidavit of Nik Mohd Ariffin was downloaded from the Industrial Court website. The court is unable to see how the fact that the JC graduated from the first defendant could give rise to allegations of bias and finds this ground to be without basis.

[4] The court finds the second ground of the plaintiff also to be without bias. At the case management stage, what the court had done was merely to encourage the parties to look at the relative strengths of their own cases with a view to engaging the other party in meaningful discussions. Nik Mohd Ariffin bin Jaafar was not physically present in chambers during case management and as such his averments were based on information received which does not appear to be accurate. As pointed out by learned counsel for the first defendant, the JC did not say outright that the plaintiff had no case.

[5] The court has carefully perused the authorities cited by learned counsel for the plaintiff. In the case of *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701, the recusal application was grounded on the fact that the learned judge was the judge who heard the case involving Dato' Seri Anwar bin Ibrahim, the conviction and sentence of which was handed down on 14 April 1999. Counsel had said that the conviction and sentence was the subject matter of strong public criticism. It was argued that although there was no assertion of actual bias, there might have been a perception of bias as the facts are in the public domain. The Federal Court, following the decision of the House of Lords in *Regina v Gough* [1993] AC 646, held that the test to be applied is the 'real danger of bias' test and dismissed the application for recusal.

[6] In the case of *Re Yogananthy AS Thambaiya; Ex P Idris Osman* [2007] 3 CLJ 335, the plaintiff judgment debtor had applied for the judge hearing the bankruptcy proceedings to recuse himself on the grounds that the judge had, in dismissing the plaintiff's application for reinstatement of a suit that had been struck out, commented that the plaintiff had been indolent, that she was defiant and unremorseful and that her claim had no real chance of success. The issue there was whether, on the facts and in the circumstances, there was a real danger of bias on the part of the judge such that he ought, in all fairness, disqualify himself from hearing and adjudicating on the bankruptcy

proceedings against the plaintiff. There the High Court, in dismissing the application, referred to a decision of the Ontario Court of Appeal in *Marchand (litigation guardian of) v Public General Hospital Society of Chatham* (2000) 138 OAC 201 which held as follows:

> Courts presume that judges will carry out their oath of office. Thus *to make out an allegation of judicial bias requires cogent evidence. Suspicion is not enough. The threshold is high because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice*. (Emphasis added.)

[7] In considering this application for recusal, I had duly considered the grounds for the application. I found the first ground to be frivolous and totally without basis. The fact that I had graduated from the first defendant university cannot conceivably give rise to an apprehended or apparent bias and thus cannot constitute a valid basis for a recusal application.

[8] Similarly, I was of the view that the second ground for the application was without basis. Comments made in the course of case management, after due perusal of the pleadings, bundles of documents and witness statements, and directions to parties to review their own cases cannot give rise to an apprehension of bias. In the final analysis, a case will only be determined after hearing all the witnesses and considering their evidence.

[9] In dismissing the plaintiff's recusal application, I am reminded of the myriad of authorities which warn against being too ready to agree to a recusal application. In the case of *Bainton v Rajski* (1992) 29 NSWLR 539, Mahoney JA held as follows:

> It is accepted that justice must be done and that the appearance of justice must be maintained. *But that … does not require that, if a party alleges or even believes in the disqualifying facts alleged, the judge should withdraw*. If that were so, the administration of justice and the rights of other parties would be governed by the allegation of or the belief in facts, however dishonest, paranoiac or honestly wrong. (Emphasis added.)

[10] In the case of *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97, LP Thean JA held as follows:

> A claim that there is apparent bias on the part of a judge must be based on facts that are substantially true and accurate. The fact that an allegation of bias has been made against a judge is not enough; otherwise a party could secure a judge of his choice by merely alleging bias on the part of another or other judges. *A judge is not obliged to withdraw based on facts which are inaccurate, false or devoid of substantiation*. (Emphasis added.)

[11] In this case, I was satisfied that the plaintiff has not succeeded in showing that there was a real danger of bias such that I should recuse myself from continuing to hear this case. I was satisfied that there were no valid or good reasons to allow the plaintiff's application and I therefore dismissed the application with costs of RM500 to be paid to the first defendant forthwith.

THE PLAINTIFF'S CASE

[12] The plaintiff called two witnesses in support of its case. In 2007, Nik Mohd Ariffin bin Jaafar ('PW1') had been the managing director of the plaintiff for two years. The plaintiff had three officers, namely, PW1, his son Nik Justin who was a director and Ramzi @ Ray bin Nordin as executive officer. PW1 described the nature of plaintiff's business as trading and consultancy.

[13] As a trader, PW1 would receive orders for goods, source the goods from a supplier and deliver them to the customer. Whilst agreeing that he would need to confirm the type/brand of goods and the price before he could confirm the purchase of the goods from the supplier, he disagreed that purchase orders were important and claimed that at times he would supply goods based on verbal orders. As for deposits, he did not always require deposits — it would all depend on whether it was a regular customer and the track record of the customer.

[14] On or about 5 March 2007, PW1 was asked by Razmat bin Ali ('PW2') whether he was interested in supplying golf sets to Universiti Malaya. He described Razmat as a friend with whom he often played golf and to whom he had promised a commission if he brought in any orders. Although Razmat told him the name and brand of the goods required, he did not state the price range. PW1 expressed interest. After obtaining a quotation from 'Bob' of Trans View Golf, PW1 gave to the second defendant, Norasrin bin Hussain ('Norasrin') a quotation of RM250,000 for 25 golf sets. On being informed Universiti Malaya was agreeable to the quotation, PW1 agreed to supply the golf sets on 7 March 2007. He did not take any steps to confirm that the first defendant had agreed with his quotation.

[15] PW1 claimed that he had asked Razmat why the first defendant required 25 golf sets. The answer given was: 'untuk kegunaan Universiti Malaya.' He did not know whether first defendant had a golf course and had never read about first defendant organising a golf competition. He admitted that he had no expertise in supplying golf sets.

[16] PW1 and Razmat were directed by Norasrin to deliver the 25 golf sets to Pusat Sukan UM at noon on 7 March 2007. He identified Invoice No GV001/07 dated 5 March 2007 as the invoice for '25 full golf sets Maruman

Exim Nano Extra Impact, 10 pes graphite shaft, 1 pc Driver, Wood 3 & 5 and Golf Bag'. He did not deny that these golf sets were normal golf sets and not custom made and could be bought from any golf shop.

[17] PW1 admitted that no purchase order was received from the first defendant prior to delivery of the golf sets. He received no deposit or payment from the first defendant on 7 March 2007. He also received no call from the first defendant to confirm the order. He agreed that as at 7 March 2007, there was a risk that the first defendant might not pay for the goods delivered and that he accepted the risk.

[18] PW1 testified that the date of delivery, 7 March 2007, was informed to him by Razmat. They were directed to bring the goods to the Pusat Sukan store. The goods were loaded from Trans View Golf and delivered to UM by lorry. Both PW1 and Razmat drove their cars. PW1 claimed that prior to 7 March 2007, he had entered UM only for the purpose of taking a shortcut and he did not know where Pusat Sukan was. The court notes that PW1 subsequently contradicted the above evidence when he later admitted that he had studied at UM from 1976–1980.

[19] According to PW1, he had never met Norasrin before 7 March 2007. At the time of delivery of the golf sets, Norasrin had affixed the first defendant's rubber stamp, his signature and identity card number and date on the delivery order (DO 001/07). Norasrin had signed the delivery order to confirm accepting 25 golf sets in good condition even though only 15 sets were delivered that day. He did not send any letter to the first defendant to confirm that only 15 sets were delivered on 7 March 2007. The balance of ten golf sets was only delivered by PW1 and PW2 to Norasrin at the same place on 10 March 2007. As at 10 March 2007, no payment for the goods had yet been received. He agreed he could have withheld delivery until payment was received. He further agreed that he took the risk that the first defendant would not make payment for the goods.

[20] PW1 identified Invoice No GV001/07 as the invoice for the 25 golf sets that was prepared by the plaintiff. The invoice was addressed to the Bendahari Universiti Malaya and for the attention of Encik Norasrin bin Hussain. At the time of the delivery, Razmat had told him to address the invoice to the bendahari and for the attention of Norasrin. The invoice was handed over to Norasrin at the time of the delivery on 7 March 2007.

[21] At the time of delivering the golf sets on 7 March 2007, Norasrin had discussed with PW1 about ordering 25 sets of 40 inch LCD TV which had to be delivered to UM on 7 March 2007 itself. Norasrin asked PW1 whether he could supply the TV sets. On PW1's query as to why the first defendant needed

25 LCD TV sets, he was given the explanation that the first defendant needed the TV sets urgently to be distributed to the various departments. From the store itself, PW1 contacted the supplier, Panaletrik Sdn Bhd, and obtained a quotation. Norasrin agreed with PW1's quotation of RM250,000 and requested that the electrical items be delivered that very afternoon. On the instructions of Norasrin, 20 TV sets were delivered to Rumah Universiti on the afternoon of 7 March 2007 using a 3 ton lorry. PW1 claimed that on arrival at Rumah Universiti, he saw a guard at the reception area and also a Kembara with guards who were observing them.

[22] It was revealed by PW1 that Panaletrik Sdn Bhd did not require any purchase order from the plaintiff for the 25 sets of LCD TV. They also did not require any deposit because the plaintiff was asked to give two post dated cheques. The court notes that PW1 was unable to remember the amount of the cheques and no longer had the cheque stubs. The price of RM10,000 per set was the plaintiff's quotation and not Panaletrik's price. He did not agree that the price of RM10,000 per TV set was exorbitant or that the market price of a 40 inch LCD TV at that time was about RM4,000–RM5,000 only. He was however unable to remember what the market price of such a TV set was.

[23] PW1 identified Invoice No GV003/07 and Delivery Order No DO 003/07 as the invoice and delivery order for the 25 LCD TV sets. Both the invoice and the delivery order were prepared on the same day and brought to UM by Ray. The date 5 March 2007 on the delivery order was admittedly wrong and should have been 7 March 2007. He also agreed that the amount of 25 sets on the delivery order was wrong and should have been 20 sets. At the time of the delivery, Norasrin had affixed the first defendant's rubber stamp, his signature and identity card number and date on the delivery order. Only 20 sets were delivered then as the lorry could only carry 20 sets. As the hour was late, Norasrin directed that the balance of five sets be delivered to his house at Kota Damansara and he would send the five sets to UM the next day. It was Norasrin who brought PW1 to his house. At Norasrin's house, PW1 had again asked about payment and was told that payment would be made within a week.

[24] After the deliveries on 7 March 2007 and 10 March 2007, Norasrin had promised PW1 that payment would be made on 14 March 2007 by the first defendant. On the promised date, PW1 and Razmat called Norasrin to enquire about the payment but were given various excuses and told that payment would be made on 23 March 2007. And on 23 March 2007, PW1 and Razmat met Norasrin at a restaurant named Amjal. When PW1 requested payment, he was handed a photostat copy of a UM cheque for RM250,000 (P1) as proof that the cheque had been issued and deposited into the plaintiff's account as part payment for the goods ordered. PW1 claimed that he asked Norasrin for

the deposit slip but was told he had not brought it. He had also asked why only RM250,000 had been deposited and was told that the balance would be paid after that payment.

[25] After a few days, the plaintiff's bank informed PW1 that no cheque for RM250,000 had been deposited into its account. PW1 and Razmat had gone to UM to conduct investigation into the goods which had been supplied and the outstanding payment. On arrival at the Pusat Sukan store, they discovered that the golf sets were no longer there. At Rumah Universiti they also discovered that the LCD TV sets were no longer there. A look at the registration book of Rumah Universiti revealed that Norasrin had registered his name in the book from 7 March 2007 to 23 March 2007. PW1 also found out that Norasrin had been suspended from work more than three years earlier. Being dissatisfied, PW1 and Razmat went to the Bursar Department and met with an Encik Anuar who informed them that the cheque was a forgery and advised them to lodge a police report.

[26] PW1 identified the police report at pp 13–14 of AB1 as the police report that was lodged on 28 March 2007 by Ramzy @ Ray bin Nordin, a representative of the plaintiff. PW1 had gone with Ray to the police station but he had asked Ray to lodge the police report. Ray has since left the plaintiff's employment and PW1 was unaware of his present whereabouts. When PW1's statement was recorded by the investigating officer, he was informed that Norasrin was involved in a cheating case previously. A portion of the goods were subsequently recovered by the police whilst a portion was never traced. The plaintiff never recovered any of the goods.

[27] PW1 testified that there was a guard at the university gate when he entered on 7 March 2007, 10 March 2007 and 23 March 2007 but that he was not stopped at all. On all those dates, he did not see any notice or warning about Norasrin at the university gate, at the Pusat Sukan store or at Rumah Universiti.

[28] PW1 confessed that he had no prior dealings with the first defendant and that he did not know its procurement procedures. He had no knowledge that Norasrin had been suspended from work at the material time. He did not know that Norasrin had no authority to place order for goods on behalf of the first defendant. He pointed out that deliveries on 7 March 2007 and 10 March 2007 were made to the first defendant's premises and the goods were received by Norasrin who was wearing a 'tag nama kerja UM'. PW1 had seen the name tag clearly — it bore the UM logo and Norasrin's name. It was Norasrin who had affixed the first defendant's rubber stamp, his signature and identity card number on the delivery note.

[29] PW1 wrote a letter of complaint dated 9 April 2007 to the plaintiff but received no response. The suppliers of the goods had demanded payment for the goods. The suppliers of the TV sets commenced an action against the plaintiff at the Kuala Lumpur Sessions Court and obtained judgment. Razmat had signed a *surat pinjaman kewangan secara peribadi* with the director of the TV supplier and had been summoned in court for failure to settle the loan.

[30] PW1 denied that he had supplied the golf sets and TV sets negligently because he neither received the order form nor deposit or full payment before supplying the goods. His explanation was that he had supplied the goods because:

> tempahan dibuat oleh Universiti Malaya, barang-barang pun dihantar ke dalam kawasan Universiti Malaya dan Defendan 2 telah ada tanda nama yang beliau staff Universiti Malaya. Tidak ada sebab untuk kecurigaan pesanan tersebut.
>
> ...
>
> Saya hantar barangan walaupun tidak ada borang pesanan atau down payment kerana saya yakin barang-barang pesanan benar-benar dibuat oleh Universiti Malaya dan oleh kerana ini saya rasa tidakperlu buat *down payment*.
>
> Saya tidak ambil langkah-langkah untuk mengesahkan dengan Universiti Malaya bahawa tempahan ini telah dibuat kerana saya percaya Encik Norasrin mempunyai kuasa sebagai kakitangan Universiti Malaya untuk membuat pesanan barang-barang tersebut. Oleh sebab itu, saya tidak perlu buat apa-apa pengesahan lagi.

[31] In March 2007, Razmat bin Ali ('PW2') was working at an advertising company called Such and Such Media Sdn Bhd as a managing director. He enlightened the court as to how he was contacted by a friend named Fadil bin Abdul Ghani who inquired whether he was interested in supplying goods to Universiti Malaya. PW2 had known Fadil who worked in the *New Straits Times Press* as an advertising executive since 1997. Fadil told PW2 about Norasrin, that he was a friend since school days and that he worked at Unit Sukan, Universiti Malaya.

[32] PW2 expressed interest but he did not have a trading company at that time although he had an acquaintance who could supply the goods. Norasrin had subsequently contacted him to place an order for 25 golf sets. PW2 told Norasrin that he could not make a decision on the phone and requested a meeting. He then contacted PW1 about supplying the golf sets to the first defendant and that was how the plaintiff became involved. The reason PW2 introduced the plaintiff to 'pihak UM' was so that he could 'mendapat sedikit komisen daripada NAJ kerana telah memperkenalkan pelanggan kepada syarikat NAJ'.

[33] PW2's evidence about the events of 7 March 2007 and 10 March 2007 and the delivery of the golf sets to the Pusat Universiti store and the LCD TV sets to Rumah Universiti and Norasrin's house are largely consistent with that of PW1 except for some details. PW2 also corroborated PW1's evidence about the meeting at a restaurant named Amjal and the events that followed after discovering that no cheque had been deposited into the plaintiff's account.

[34] One of the inconsistencies between the evidence of PW1 and PW2 is the question of when PW1 had met Norasrin for the first time. Whereas PW1 said that he met Norasrin for the first time on 7 March 2007, PW2 had testified about an earlier meeting at a cafe in UM, the name of which he could not remember.

[35] According to PW2, Norasrin had already agreed to PW1's quotation of RM250,000 even before their meeting. Why then was there a need for the meeting? PW2's answer that it was to:

> mengesahkan bahawa Norasrin bekerja di Universiti Malaya dan barang-barang untuk dibekalkan ke Universiti Malaya.

And the confirmation was obtained through the discussion and the fact that Norasrin wore a name tag.

[36] Another inconsistency between the evidence of PW1 and PW2 is seen in the evidence of PW1 that it was PW2 who had told him to address the invoices to Bendahari Universiti Malaya and for the attention of Norasrin. Contrary to the above evidence, PW2 denied that he had asked PW1 to address it for the attention of Norasrin.

[37] Following the first defendant's refusal to pay the plaintiff for the goods delivered, the supplier of the LCD TV sets had forced both PW1 and PW2 to be accountable for the plaintiff's loan and had forced them to sign personal loan agreements with the director of the supplier. PW2 told the court that he was forced to assume responsibility by PW1 because he was the introducer in these transactions. Subsequently, he was sued in court for a sum of RM80,000, being half of the value of the TV sets that were supplied.

THE FIRST DEFENDANT'S CASE

[38] The first defendant called a total of five witnesses. Dalila bt Md Idris ('DW1') is the Principal Assistant Bursar in the Bursar Department of the first defendant and had been with the university for the past 11 years. In 2007, she was the Principal Assistant Bursar in Bahagian Pengurusan Kewangan Pelajar.

[39] DW1 testified that the rubber stamp below the words 'RECEIVED IN GOOD CONDITION' at pp 22–23 of AB1 were false as such a rubber stamp was not used by the Bursar Department of the first defendant in 2007. The rubber stamps which were in use are as found in pp 25, 26 and 27 of AB1 and pp 7–9 of AB2. Unlike the false rubber stamps, the genuine ones would bear the name of the officer and his position in the department. It was the normal practice of the department to ensure that the original rubber stamp is affixed on the invoice as evidence of confirmation from the relevant faculty for the purpose of processing the payment. She pointed out that the rubber stamp on pp 22–23 did not bear Norasrin's name.

[40] During cross-examination, DW1 was shown various rubber stamps. In denying that the first defendant used different rubber stamps to evidence receipt, she explained that different rubber stamps were used for different purposes. For example, the rubber stamp at p 25 of AB1 was in respect of the receipt of documents for purposes of making payment whereas that on p 27 is for the receipt of documents in the Pejabat Bendahari.

[41] Upon being shown CIMB Cheque No 441813 dated 23 March 2007 for the sum of RM250,000 (P1) made out to the plaintiff and drawn on the first defendant's account, DW1 testified that the first defendant had never made any purchases from the plaintiff and as such there was no necessity to make any payment to the plaintiff by cheque. According to DW1, Cheque No 4418813 did exist but it was for a sum of RM184.69 and issued by the first defendant on 14 March 2007 to Norasrin bin Hussain for the purpose of paying his salary. The said sum was the nett amount payable to Norasrin in March 2007 in light of the fact that he was on half salary because of disciplinary action and after deducting various loans taken by him. In support of this evidence, DW1 also referred to the first defendant's payroll transaction (p 3 of AB2) which shows that Norasrin's March 2007 salary was only RM184.69. Page 3 was printed in its ordinary course from a computer under her control and the said computer was in good working condition. She tendered a certificate under s 90A of the Evidence Act 1950 (p 4 of ABa) to evidence such fact. Although she was unable to produce a copy of the cheque that was issued to Norasrin, she was however able to produce a copy of the invoice statement that recorded the issuance of Cheque No 441813 to Norasrin bin Hussain on 14 March 2007 (p 5 of AB2). She confirmed that the said statement was printed in its ordinary course from a computer that was under her control and the computer was in good working condition. She again produced a certificate under s 90A of the Evidence Act 1950 (p 6 of AB2). In light of this evidence, the court sees no basis to doubt that P1 for a sum of RM184.69 was issued by the first defendant to Norasrin in respect of his salary.

[42] DW1 was able to identify the two signatures on P1. Both signatures were computer printed. The signature above the number 441813 was that of Dr Noor Hashim bin Taib, Ketua Penolong Bendahari Kanan di Bahagian Perolehan whilst the signature on the right was that of Puan Haliza bt Harun, Timbalan Bendahari UM. Since the cheque was issued to Norasrin and not the plaintiff, and for a different sum, DW1 could only conclude that Norasrin had made a copy of the original cheque and amended the name of the payee, the date and the amount. The court finds DW1's conclusion, based on the evidence, to be both possible and plausible.

[43] In respect of the payment voucher at p 4 of AB4, DW1 told the court that she had never seen it before and that the first defendant had never had such a payment voucher. She would know as normally, payment vouchers are issued by her division — Bahagian Tunai dan Penguatkuasaan.

[44] Dr Noor Hashim bin Taib ('DW2') is the Ketua Penolong Bendahari Kanan at the Bahagian Perolehan, Jabatan Bendahari UM and had been working with the first defendant for the past 26 years. In 2007, he was the Ketua Penolong Bendahari Gred W48 until August 2007 when he was promoted to Ketua Penolong Bendahari Kanan Gred W52.

[45] DW2 describes his duties and responsibilities as follows:

(i) Menentukan dasar perolehan UM selaras dengan arahan Kerajaan Malaysia dan pihak pengurusan UM dari masa ke semasa;

(ii) Mengurus dan memproses perolehan UM mengikut peruntukan belanjawan gang telah diluluskan;

(iii) Setiausaha kepada Mesyuarat Jawatankuasa Sebutharga UM, Lembaga Perolehan A dan Lembaga Perolehan B;

(iv) Menyelia urusan pengiklanan kepada akhbar tempatan dan memperkemaskinikan Dokumen-dokumen tender untuk urusan pelawaan tender; dan

(v) Menguruskan surat-surat kelulusan tawaran, surat perjanjian dan pesanan bagi nilai perolehan melebihi RM50,000 yang diluluskan oleh Jawatankuasa Sebutharga dan Lembaga-lembaga Perolehan tersebut.

[46] DW2 identified the Manual Perolehan UM as containing the guidelines set out by the first defendant applicable for all faculties and departments. In general, all procurements below RM200,000 made before 25 June 2009 was to be by quotation whereas procurements valued at more than RM200,000 was to be by tender. Faculties or departments in the first defendant could not procure goods valued at more than RM20,000 without the prior approval of the procurement division.

[47] It was pointed out that if the first defendant had really wanted to procure goods valued at RM500,000, the steps to be taken include advertisement of the goods for tender, submission of tender documents by interested suppliers, evaluation of the tender documents by the Jawatankuasa Penilaian Spesifikasi dan Teknikal and the Jawatankuasa Penilaian Harga Peringkat (PTj), separate valuations to be done by the two Jawatankuasa and submission of valuation reports to the procurement division, processing the valuation reports and obtaining the approval of the Lembaga Perolehan B and after approval, obtaining the letter of approval and lastly, the procurement division preparing the offer letter, letter of acceptance, performance bond, purchase order and agreement to be given to the successful supplier or contractor.

[48] Apart from the above, the successful tender was required to send the acceptance letter and a bank guarantee of 2.5% of the total procurement value for contracts valued at more than RM200,000 up to RM500,000. DW2 was never challenged on his evidence that the plaintiff had never submitted a tender to the first defendant. He also confirmed that in all his years with the procurement division, the first defendant had also not procured any golf sets or television sets.

[49] Re the Manual Perolehan, DW2 admitted that he was uncertain how many times the manual had been amended since 2002 but he was able to say that there had been one amendment since 2009. He agreed that the provisions on tender procedures were internal matters. Although there was some confusion as to whether the Manual Perolehan that was tendered was in force at the material time, DW2 was able to confirm that the requirement as to the performance bond was applicable as borne out by the *surat pekeliling* D1.

[50] Ishak bin Awang ('DW3') is a Pembantu Tadbir (Perkeranian/Operasi), Bahagian Perkhidmatan, Pusat Sukan Universiti Malaya. In 2007, he was the Pembantu Tadbir at the Bahagian Perkhidmatan Sukan UM. His two major responsibilities were to take care of the store at the Pusat Sukan which includes the movement of goods belonging to the Pusat and the preparation of an inventory system for equipment belonging to the store.

[51] DW3's working hours in 2007 were from 8.30am–5.30pm. If there was a sports programme, his working hours could extend to 9pm.

[52] DW3 knew Norasrin who used to be a staff of Pusat Sukan holding the position of Penolong Pegawai Belia dan Sukan Gred 27. By the time DW3 commenced work at Pusat Sukan, Norasrin had been interdicted on allegations of cheating. His relationship with Norasrin was limited to activities such as playing football. He was informed that Norasrin was still a staff of Pusat Sukan

although he was interdicted. He did not receive any instructions from the management of the first defendant to prohibit Norasrin from using the Pusat Sukan store.

[53] DW3 denied that Norasrin was ever given the authority to take care of the Pusat Sukan store. The person who was responsible for taking care of the store before DW3 was Encik Ismail Abdul Rahman who has since retired. In carrying out his duties, DW3 was assisted by Encik Ramli bin Kassim from 2006–2008. Since 2008, he has been the only staff who was tasked with taking care of the store.

[54] According to DW3, the Pusat Sukan store was locked at all times. He held one key whilst an additional key was kept in a locked box in the Pusat Sukan office. As such, the Pusat Sukan store could only be entered with the knowledge of DW3 and Encik Ramli during the years 2006–2008. To the best of his knowledge, Norasrin did not hold a key to the said store.

[55] DW3 identified the floor plan of the ground floor of the Pusat Sukan and the location of the office (p 15 of AB2) and pointed out the location of the locked box at the right hand corner of the office. The locked box was located right behind DW3's table and to get to it, one would have to walk past a number of tables belonging to the staff of the Pusat Sukan. No security guard was tasked to sit at the reception area. A visitor to the Pusat Sukan wishing to meet with an officer would have to enquire at the counter of the Pejabat Sukan located in the Pejabat Perkhidmatan.

[56] Although the Pusat Sukan had another store located near the university *padang*, however that store was only used to store equipment which was about to be used for sports competitions. That second store too was locked and the key held by DW3.

[57] Goods purchased by the Pusat Sukan would not be received by the Bursar Department. Neither would goods which were bought by the Pusat Sukan be delivered to other places such as the Rumah Universiti.

[58] DW3 explained the procedure for storing goods at the Pusat Sukan store. When goods arrive, DW3 would be informed by the supplier or the staff of the Pusat Sukan. He would then check the invoice and delivery order to ensure that the goods conform to specifications laid out by Pusat Sukan. He stressed the point that only he had the authority to examine the said documents on behalf of the Pusat Sukan. DW3 would then supervise the transfer of the goods into the store. DW3 would enter into the inventory items such as hockey sticks which would form part of the assets of the Pusat Sukan. However, disposable items such as shuttlecocks would not be recorded in the inventory.

[59] DW3 referred the court to samples of invoices/delivery orders received by Pusat Sukan which contains rubber stamps. The court notes that all these rubber stamps contain the name and position of the person confirming receipt of the goods.

[60] Only DW3 and his assistant could use the store to store goods and only the staff and students of the first defendant could use the goods kept at the store. Any person wishing to make use of goods kept at the store would have to fill out a form before the goods could be taken out.

[61] To the best of DW3's knowledge, Pusat Sukan had no dealings with, and had never received goods from, the plaintiff. To the best of his knowledge, Pusat Sukan had never bought golf sets or TV sets.

[62] DW3 was unable to recall whether he or his assistant was working on 7 March 2007. He agreed with the suggestion that there no one was looking after the store on 7 March 2007 and 10 March 2007. He claimed to be certain that no one was looking after the store on those two days. When asked how he could be sure, he gave the following incomprehensible answer:

> Saya pasti kerana saya tidak ingat.

[63] Norshan bt Abdullah ('DW4') is the Ketua Pegawai Belia dan Sukan di Pusat Sukan UM. In 2007, she was the Pegawai Belia dan Sukan Gred S41. She describes her job scope as supervising the work of all the officers of the Pusat Sukan, including programs and administration. The Pusat Sukan had an annual budget given early each year for carrying out its activities for the staff and students of the first defendant. There was no requirement to finish the annual budget if there was no need to do so.

[64] DW4 had known Norasrin since she first started work at Pusat Sukan in February 1998. Norasrin was a staff who had been interdicted. He received no salary after 10 November 2009 but before then was drawing half salary since 8 July 2003. DW3 agreed with the suggestion that after being interdicted, Norasrin could only enter the first defendant if he had official business. She said that Norasrin had no official business in the first defendant on 7 March 2007 and 10 March 2007. She agreed that Norasrin's duties and responsibilities would be an internal matter of the first defendant and known only to the first defendant and its employees.

[65] DW4 was aware of the charges against Norasrin. The charge sheet at p 8 involved an incident on 8 April 2003 whereas that on p 10 was in relation to an incident on 23 September 2002. She agreed that these charges were serious in nature. However, she claimed not to know the nature of the cheating on Teoh

Heng Teong. She said that she received instructions to prevent Norasrin from using the store after 2003 although she was uncertain whether those instructions came from the human resource division. She had no knowledge whether Norasrin had used the store's facilities on 7 March 2007 and 10 March 2007.

[66] DW4 confirmed that Pusat Sukan could purchase goods valued at not more than RM10,000 without the approval of the Bursar Department. The approval of the Pengarah Pusat Sukan was required for every purchase by Pusat Sukan and this would have to follow the procurement procedures as set in the Manual Perolehan.

[67] The ordering of goods on behalf of the Pusat Sukan did not fall within the duties and responsibilities of Norasrin. In fact, any officer wishing to make any purchase on behalf of the Pusat Sukan would have to explain to the Pengarah the purpose of the purchase and obtain her prior approval. She agreed that all this would also be an internal matter of the first defendant and known only to the first defendant and its employees.

[68] DW4 had never seen the invoices from the plaintiff dated 5 March 2007 totaling RM500,000 and neither did she have any knowledge about the goods as stated in the invoices. In any event, the purchase of those goods did not follow accepted procedures. In light of the fact that the cost of the goods was RM500,000, the approval of the Bursar Department should first be obtained.

[69] DW4 confirmed that Pusat Sukan had no dealings with Syarikat Wai Fong Art & Trading, Syarikat Impian Sdn Bhd or the plaintiff, NAJ Global Sdn Bhd. Pusat Sukan had never bought any golf sets or television sets. Items purchased by Pusat Sukan were limited to sports apparel and small sports equipment such as balls. Pusat Sukan had never purchased any golf sets because the first defendant did not own a golf course and neither had it carried out any golf competitions.

[70] DW4 confirmed that Ishak bin Awang (DW3) was the only staff who was tasked with taking care of the store and Norasrin had never been given the authority to take care of the store.

[71] The fifth and final witness for the defendant is Yusof bin Haron ('DW5'). He is the assistant registrar, human resource division of the first defendant and had been with the first defendant since 1986. In 2007, he was then holding the post of principal assistant registrar and his various responsibilities include human resource administration.

[72] DW5 testified that the second defendant, Norasrin bin Hussain, commenced work with the first defendant as an attendant in the physics department from 3 February 1987 to 1 November 1987 on temporary appointment. He commenced employment on a permanent basis on 2 November 1987 when he was appointed to the post of Penolong Pegawai Kemajuan Sukan Tingkatan Biasa Pusat Sukan UM.

[73] He identified the Notis Tahan Kerja dated 4 November 2003 addressed to Norasrin signed by Dato' Professor Dr Hashim bin Yaacob in his capacity as the Chairman of the Disciplinary Committee D of the first defendant as a letter informing Norasrin that he was interdicted from work with effect from 8 July 2003. The Notis was sent to Norasrin through the Director of the Sungai Buluh Prison.

[74] DW5 explained that Norasrin was interdicted because he had been charged with three offences of cheating under s 420 of the Penal Code. Under regs 46(1)(a) and 46(2) of the Statutory Bodies Disciplinary Regulations, an employee of a statutory body such as the first defendant who has been charged in court for a criminal offence and against whom disciplinary proceedings has been commenced may be interdicted.

[75] DW5 referred the court to a police report lodged by Norilah bt Salam, the Pemangku Pendaftar UM on 5 April 2007. The report refers to the receipt of two delivery orders from the plaintiff which contained rubber stamps allegedly of the Jabatan Bendahari UM and a cheque dated 23 March 2007 for the sum of RM500,000 allegedly issued by the first defendant to the plaintiff. The maker of the report stated categorically that the first defendant had never given any authority to Norasrin to order the said goods or to issue any cheque to the plaintiff.

[76] It was confirmed that Norasrin was still an employee of the first plaintiff at the time when the police report was lodged although he was then interdicted. The first defendant did not have a policy to prevent its employees, including those who had been interdicted, from entering its premises. Interdicted employees were still employees and remain so until they were dismissed. They could enter the university as they liked and not necessarily only if they had official business. During the entire time that he was interdicted, Norasrin received half his monthly salary. He however agreed that the charges against Norasrin were serious in nature and that the human resource department should have issued an order to prevent Norasrin from entering the first defendant's premises. After 2003, no order was issued by the first defendant to prevent Norasrin from entering either the Pusat Sukan store or Rumah Universiti. The Rumah Universiti is operated by the Kooperasi Universiti like a hotel with guests going in and out.

[77] Vide a letter dated 19 November 2009, the Kuala Lumpur Sessions Court informed the first defendant that Norasrin had been convicted on three charges of cheating under s 420 of the Penal Code and sentenced to 12 months imprisonment with effect from the date of his sentence in respect of each charge, such sentences to run consecutively. The first defendant then informed Norasrin of the decision to suspend him with effect from 10 November 2009 from which date he would no longer be receiving any emoluments from the first defendant. According to DW5, Norasrin was still an employee of the first defendant as he had filed appeals against his conviction and sentence. In the event that his appeals are dismissed, the matter would be brought to the disciplinary board to consider a termination of his services.

EVALUATION OF THE EVIDENCE AND FINDINGS

[78] In coming to a decision in this case, the court has carefully weighed the evidence adduced by the parties. The court has also considered the documentary exhibits relied upon as well as the written submissions prepared by both parties.

[79] A careful scrutiny of the evidence adduced shows that the first defendant would have little, if any, knowledge about the interactions between the plaintiff and Norasrin. From PW1 and PW1's evidence, it is clear that their dealings had all along been with Norasrin bin Hussain, the second defendant. The plaintiff had no prior dealings with the first defendant.

[80] What then is the nature of PW1's dealings with Norasrin? The court finds that this can be summarised as follows:

(a) On 5 March 2007, PW1 was asked by Razmat bin Ali (PW2) whether he was interested in supplying golf sets to Universiti Malaya. PW1 expressed interest. PW1 obtained a quotation of RM250,000 for 25 golf sets from 'Bob' of Trans View Golf. He was informed that the first defendant was agreeable to the quotation and was directed by Norasrin, through Razmat, to deliver the 25 golf sets to Pusat Sukan UM at noon on 7 March 2007.

(b) At the time of delivery of the golf sets on 7 March 2007, PW1 had received no purchase order from the first defendant nor had he received any deposit or payment. He had also not received any call from the first defendant to confirm the order.

(c) On 7 March 2007, 15 golf sets were loaded from Trans View Golf and delivered to Pusat Sukan. At the time of the delivery, Norasrin affixed the first defendant's rubber stamp, his signature and identity card number and the date on the delivery order (DO 001/07). Norasrin signed the

delivery order confirming acceptance of 25 golf sets in good condition even though only 15 sets were delivered. No payment was made for the goods.

(d) Invoice No GV001/07 for '25 full golf sets Maruman Exim Nano Extra Impact, 10 pes graphite shaft, 1 pc Driver, Wood 3 & 5 and Golf Bag' addressed to the Bendahari Universiti Malaya for the attention of Encik Norasrin bin Hussain was handed over to Norasrin at the time of the delivery on 7 March 2007.

[81] The court has carefully studied the above sequence of events to see whether it supports the plaintiff's contention that the first defendant had ordered, purchased and accepted delivery of the goods. From the evidence as adduced from the plaintiff's two witnesses, the court finds that it is crystal clear that PW1's dealings had all along been with Norasrin, the second defendant. His conversations on the telephone re the quotation for the golf sets had been with Norasrin. It was Norasrin who accepted the quotation. He had face to face discussion with Norasrin re the purchase of the TV sets. His quotation of RM250,000 for 25 units of 40 inch LCD TV sets was accepted by Norasrin. Arrangements on delivery such as time and place of delivery were dictated by Norasrin. And the delivery orders were signed by Norasrin. From the above recounting, the court is unable to see the first defendant's role in ordering, purchasing or taking delivery of the goods.

[82] What then is the plaintiff relying on in claiming that the first defendant was liable? The court notes that in para 6 of the statement of claim, the plaintiff had pleaded that the second defendant had represented that he had the authority to order the said goods and that it was based on that representation that the plaintiff was moved to deliver the goods. Details of this misrepresentation as set out in para 6 are as follows:

(a) the second defendant misrepresented that he had authority to order the goods on behalf of the first defendant;

(b) the second defendant directed almost all the goods to be delivered to the premises of the first defendant, namely to Pusat Sukan and Rumah Universiti;

(c) the second defendant wore a name tag of the first defendant at the time when the deliveries were made; and

(d) the second defendant showed a cheque allegedly issued by the first defendant for payment to the plaintiff.

[83] Apart from item (a) above, all the other incidences may well have happened. However, in respect of item (a), the court is unable to find any evidence from either PW1 or PW2 which point to the fact that Norasrin had at

any time represented that he had authority to place orders on behalf of the first defendant. It is the finding of the court that the factors that influenced PW1 could not have been the name tag worn by the second defendant. The court finds that at the time PW1 agreed to supply the 25 golf sets, he had yet to see the second defendant's name tag although he would have had sight of it by the time he agreed to supply the 25 LCD TV sets. Similarly, the issue about being shown the alleged payment cheque could not conceivably be seen as a misrepresentation which induced the plaintiff to supply the goods as this cheque was seen way after all the goods had been supplied. As such, what is left is the delivery of almost all the goods to the premises of the first defendant. The court is doubtful whether this would constitute sufficient representation that Norasrin had sufficient authority to enter into the contracts.

[84] To the knowledge of the plaintiff, what was the designation of Norasrin? PW1 was silent on this. The only clue on this comes from the evidence of PW2 who told the court that it was Fadil who said that Norasrin worked at Unit Sukan, Universiti Malaya. What was his designation at Unit Sukan? What were his functions and responsibilities in Unit Sukan? Would a person who worked at the Unit Sukan be empowered to order purchases to the value of half a million ringgit? These are questions which the court has to consider when deciding whether Norasrin had any real or ostensible authority to place orders for the goods in question, to accept delivery of the goods or, for that matter, to enter into any contract whatsoever with the plaintiff.

[85] According to DW4, Norasrin was an employee of the Pusat Sukan UM holding the position of Penolong Pegawai Belia dan Sukan Gred 27 before his interdiction. He describes Norasrin's duties and responsibilities as assisting in the preparation of the sports programs for the annual calendar, to carry out planned activities and carrying out all such tasks as is directed by the Timbalan Pengarah (Perkhidmatan) Pusat Sukan UM. The court does not perceive anything from his known position or from his list of duties and responsibilities from which it could conceivably be assumed that he had authority to make such purchases. The plaintiff had no previous dealings with first defendant in which Norasrin had represented the first defendant. The court finds from the evidence adduced that is amply clear that Norasrin had no real or ostensible authority to act for the first defendant in placing orders for golf sets and LCD TV sets and to accept delivery for them.

[86] The court's finding in this regard finds support in the case of *Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur* [1969] 1 MLJ 123. In that case, the plaintiffs without knowing that local orders presented to them by the office messenger were forgeries, sold and delivered certain goods to the defendants through the office messenger. The orders had been forged by the office messenger and the defendants never received the goods. The forged

orders were on the official forms of the defendants and were duly signed and stamped. The plaintiffs brought a claim for goods sold and delivered on the principle of ostensible authority. The defendants had no previous dealings with the plaintiffs and it was not the duty of the office messenger to issue local orders. There it was held by Raja Azlan Shah J (as His Highness then was) that as the defendants did not hold him out to the plaintiffs as having authority to issue local orders and it was not part of his duties to issue them, the defendants were not vicariously liable to the plaintiffs for the forgeries committed by the office messenger.

[87] Following and in line with the decision of *Negara Traders*, the court finds that on the facts, the first defendant had not held out the second defendant, Norasrin, as having any real or ostensible authority. As such, the court finds that the first defendant was not vicariously liable to the plaintiff for the misrepresentations of Norasrin.

THE RUBBER STAMPS ON THE DELIVERY NOTES

[88] One of the agreed issues to be tried is whether the rubbers stamps on the delivery notes had been forged or falsified by Norasrin. The court notes that the two delivery notes which bear a rubber stamp with the words 'JABATAN BENDAHARI UNIVERSITI MALAYA KUALA LUMPUR' were affixed by Norasrin together with his signature, IC No and date. Was this a genuine rubber stamp of the first defendant and was Norasrin authorised to use it?

[89] The court notes the evidence of Dalila bt Md Idris ('DW1') to the effect that the two rubber stamps on the two delivery orders were false and that such a rubber stamp was not used by the Bursar Department in 2007. She pointed out genuine rubber stamps would bear the name of the officer and his position in the department and that it was normal practice of the department to ensure that the original rubber stamp is affixed on the invoice as confirmation of goods ordered from the department before the invoice is received by Jabatan Bendahari UM for processing payment.

[90] The court does not agree with the contention of the plaintiff that the first defendant had used different rubber stamps to evidence receipt of goods. The court notes and accepts DW1's evidence that different rubber stamps were used for different purposes namely to confirm order of goods, to confirm receipt of goods or to confirm receipt of documents for purposes of making payment. It is quite apparent that rubber stamps acknowledged by the first defendant to be genuine had all contained *both the name of the officer as well as his designation*. It is also clear and undisputed that the rubber stamps on the two delivery orders in this case did not bears Norasrin's name nor his designation in the Bursar Department.

[91] In this respect, the court has no hesitation in finding that the rubber stamps on the two delivery orders were not the genuine rubber stamp of the first defendant. The court further finds that since it is Norasrin himself who had placed the rubber stamps on the delivery notes after accepting — part payment, it follows there from that it was Norasrin who had falsified the stamps. When all is said and done, the court finds that the fact that Norasrin had accepted delivery of goods and had placed a false stamp on the delivery note to signify acceptance of the goods does not equate to proof that the first defendant had received the goods.

THE CIMB CHEQUE NO 441813 FOR RM500,000

[92] As regards the CIMB Cheque No 441813 dated 23 March 2007 for the sum of RM500,000 in the name of the plaintiff, the court has no hesitation in accepting the evidence of DW1 that a cheque bearing the same number was issued to Norasrin on 14 March 2007. The original cheque for a sum of RM184.69 only was made out to Norasrin for payment of his salary. The court notes her explanation that that sum was the nett amount payable to him in March 2007 taking into account that he was on half salary and after deducting various loans taken by him. This evidence is supported by the payroll transaction which shows that Norasrin's March 2007 salary was only RM184.69 as well as a copy of the invoice statement that recorded the issuance of Cheque No 441813 to Norasrin bin Hussain on 14 March 2007. The court finds that Cheque No 441813 for the sum of RM500,000 was a falsified cheque and that the said cheque was not issued by the first defendant.

[93] In light of the fact that CIMB Cheque No 441813 for RM184.69 was issued to Norasrin on 14 March 2007 and a photocopy of the same cheque but now for a sum of RM500,000 and dated 23 March 2007 was shown to PW1 and PW2 at Amjal Restaurant on 23 March 2007 as proof that the cheque had been deposited into the plaintiff's account leads the court to the irresistible conclusion that it was Norasrin who had falsified the cheque.

WAS THE FIRST DEFENDANT GUILTY OF NEGLIGENCE?

[94] In para 11 of the statement of claim, it was pleaded that the loss suffered by the plaintiff was due the 'kecuaian sepenuhnya dan/atau kecuaian sertaan dan/atau kecuaian vikarius' of the first defendant. It would appear that the negligence complained of by the plaintiff stems from the failure of the first defendant to prevent Norasrin from entering the premises of the first defendant and from using the facilities of the first defendant when it knew on 14 February 2007 about his cheating another company; for failing to issue warnings to its employees or agents to prevent Norasrin from entering the premises of the first defendant or from using its facilities; for failing to affix notices or warnings at

A the entrances of the first defendant about the interdiction of Norasrin as well as failure to withhold the *pas pekerja* of Norasrin during his interdiction.

[95] First and foremost, it must be borne in mind that the first defendant is a university with a large campus consisting of various faculty buildings, B residential hostels and administrative and other buildings. Secondly, the court cannot lose sight of the fact at the material time, Norasrin bin Hussain was only interdicted and not yet dismissed from the services of the first defendant.

STATUS OR POSITION OF AN INTERDICTED EMPLOYEE

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[96] What is the position of an interdicted employee? He is still an employee. As pointed out by DW5, regs 46(1)(a) and 46(2) of the Statutory Bodies Disciplinary Regulations would enable the first defendant to interdict Norasrin as he had been charged with cheating under s 420 of the Penal Code and D disciplinary proceedings has been commenced against him. Notwithstanding his interdiction, he remained an employee of the first defendant. The court recalls the evidence of DW5 that the first defendant did not have a policy to prevent its employees, including those who had been interdicted, from entering its premises, and rightly so. They could enter the university as they E liked and not necessarily only if they had official business.

[97] The court further notes that during his interdiction, Norasrin received half his monthly salary. It was only after he was suspended with effect from 10 F November 2009 that he stopped receiving any emoluments from the first defendant.

[98] The court finds that the actions of the first defendant in not preventing, or issuing warnings to its servants or agents to prevent, Norasrin from entering G its premises or from using its facilities and not affixing notices or warnings at the entrances of the university to warn the public about the interdiction of Norasrin was *not* unreasonable. To do so, especially to affix warning notices about the interdiction as suggested by the plaintiff, would have opened the first defendant to a plethora of lawsuits. The court finds no negligence on the part H of the first defendant in this regard.

DID THE FIRST DEFENDANT OWE A DUTY OF CARE TO THE PLAINTIFF?

I **[99]** The plaintiff has submitted that the first defendant owed it a duty of care. Reliance was placed on the case of *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 which espoused the rule that you must take reasonable care to avoid acts or omissions which you can reasonably be foreseen would be likely to injure your neighbor. And 'neighbor' is defined as persons

who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions.

[100] In the case of *Low Kean Giap & Ors v Shaik Alawdeen Shgaik Dawood & Anor* [1999] MLJU 377; [1999] 7 CLJ 44 Abdul Malik Ishak J had held as follows:

> It is purely a question of law whether or not there exists a duty of care. An action in negligence must necessarily fail if the plaintiff fails to establish the existence of a duty of care. Indeed negligence is also said to be a failure to exercise due care where a duty to take care exists. After the decision of the Privy Council in *Yuen Kun Yeu and others v Attorney-General of Hong Kong* [1988] AC 175, the law developed rapidly. Four separate steps emerged to determine the issue of the duty of care. Firstly, it must be reasonably foreseeable that the conduct of the defendant will cause damage to the plaintiff. Secondly, there must be sufficient 'proximity' between the parties. Thirdly, as Lord Bridge in *Caparo Industries Plc v Dickman and others* [1990] 2 AC 605 said: '... the situation (must) be one in which the court considers it fair, just and reasonable that the law should impose a duty of care of a given scope on the one party to the benefit of the other.' Fourthly, there must not be a ground of public policy to exclude the duty of care.

[101] The court agrees with learned counsel for the first defendant that there is no proximity of relationship between the plaintiff and the first defendant in this case. The first defendant had never dealt with the plaintiff before; it had never ordered, purchased or received goods from the plaintiff before; in fact there was no prior contractual relationship of any kind between the plaintiff and the first defendant. The court is unable to agree with learned counsel for the plaintiff that just because the plaintiff fell within the category of 'supplier' who was cheated by Norasrin, there was proximity of relationship. Neither does the fact that the plaintiff was allowed into the first defendant's premises together with lorry and car denote such a relationship.

[102] The court finds that in all the circumstance of this case, the situation is not one in which the court considers fair, just and reasonable to impose a duty of care on the first defendant. In matters of trade, traders must enter into transactions with their eyes open. They must take proper steps to reduce their risks. The court finds a multitude of factors which should immediately have put the plaintiff on guard. They are:

(a) The speed with which the entire transaction was concluded with orders and quotations being made over the phone; orders, quotations, agreement and delivery all made on the same day; orders made without proper order forms and payment of deposits.

(b) Questions asked as to why it was necessary to order the golf sets and LCD TV sets through the plaintiff when the golf sets were not custom made and would readily be available from any golf shop; why order through the plaintiff when 40 inch LCD TV sets were readily available from any electrical shop; why it was necessary to pay so much more for goods which were readily available.

(c) Norasrin's immediate agreement with the quotations given by the plaintiff; whether he had authority to approve a quotation of RM250,000 by himself without obtaining the approval of his superiors. Questions must surely have been asked as to whether a big institution like the first defendant had such simple and lax procurement procedures for goods valued at RM250,000.

(d) The unholy haste in which the goods had to be supplied.

(e) The fact that Norasrin acknowledged receipt of more goods than was delivered on two occasions.

The court finds the plaintiff should have been put on guard that all was not as it seemed by this strange series of events.

[103] The reason why the plaintiff agreed to supply the goods, allegedly to the first defendant, despite certain misgivings can be derived from the police report that was lodged by Ramzy @ Ray bin Nordin. Paragraph 3 of the said report reads as follows:

> Bayaran dijanjikan untuk kesemua barangan yang berjumlah RM500,000 pada 14/3/07. Tapi sehingga kini tiada apa-apa bayaran yang dibuat melainkan sekeping cek Universiti Malaya yang telah dipalsukan sebanyak RM250,000 yang diberikan pada 23/3/07. *Kami mempercayai beliau kerana urusan ini dibuat di dalam kawasan U/Malaya dan penghantaran juga dibuat menggunakan kemudahan di UM. Kami juga tidak dibenarkan berurusan terus dengan pejabat Bendahari Universiti Malaya kerana kononnya urusan melibatkan orang dalam pejabat Bendahari yang meluluskan pembayaran secara tidak mengikut prosedur*. Yang mana perkara ini jelas memburukkan nama baik Universiti Malaya yang telah diiktiraf sebagai satu universiti terbaik dunia. (Emphasis added.)

The court views this report as being very telling. It speaks of knowledge on the part of the plaintiff that normal procedures were not being followed in these transactions and that was why they could not deal directly with the Bursar's office. In light of these circumstances where the plaintiff willingly allows himself to be drawn into transactions which appear to be somewhat shady, the court is unable to find that the law imposes a duty of care on the first defendant for the benefit of the plaintiff.

[104] Based on the above findings, the court finds that the first defendant does not owe a duty of care to the plaintiff. The court finds that the plaintiff

should have exercised due care and caution especially when it willingly entered into dealings which do not follow normal and accepted procedures. As PW1 himself admitted, he took the risk that the first defendant might not pay for the goods.

CONCLUSION

[105] In conclusion the court finds that the plaintiff has failed to prove negligence on the part of the first defendant and its claim for damages of RM500,000, general damages and aggravated damages on a balance of probabilities. Neither has the plaintiff succeeded in proving that the first defendant was vicariously liable for the actions of Norasrin. Accordingly, the plaintiff's case against the first defendant is dismissed with costs to be taxed.

Plaintiff's application against the first defendant dismissed with costs.

Reported by Kohila Nesan